

ENVIRONMENTAL PROTECTION COMMISSION[567]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 455B.474, the Environmental Protection Commission hereby gives Notice of Intended Action to amend Chapter 135, "Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks," Iowa Administrative Code.

The Commission adopted rules that were published in the July 2, 2008, Iowa Administrative Bulletin as **ARC 6892B**. The rules were scheduled to take effect on August 6, 2008. The rules contained some provisions which were relatively uncontroversial and some provisions that were controversial. The more controversial rules in part established a policy and procedure for the assessment of the potential risk of impact from underground storage tank (UST) petroleum releases to public water supply wells (PWSWs) which are located outside the actual or modeled contaminated groundwater plume. The rules established an assessment protocol in which owners and operators of USTs and the Department shared responsibility to initially conduct sufficient assessment of soil and groundwater contamination to determine the likelihood that a UST release could impact a PWSW. If sufficient evidence of potential or actual impact was established, the rules placed responsibility on the owner and operator to conduct further risk assessment and corrective action as necessary to protect human health and safety.

In response to public comment, some of which supported and some of which objected to the rules, the Administrative Rules Review Committee (ARRC) at a public meeting on July 8, 2008, imposed a 70-day delay on the entire rule making (**ARC 6892B**) pursuant to Iowa Code section 17A.4(6). The ARRC requested that the primary stakeholders and Department staff attempt to reach a resolution of their differences. The 70-day delay, by law, expired October 16, 2008.

The Department and other stakeholders reached an agreement which generally provides for the Department and the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (UST Fund) to enter into an intergovernmental agreement (28E Agreement) to jointly develop and implement a study of the risk to PWSWs from UST petroleum releases. The study is funded by public funds under the control of the UST Fund. The stakeholder agreement also required that the Commission agree to initiate a rule making to rescind those parts of the adopted rules in **ARC 6892B** which are controversial and relate to the PWSW risk assessment protocol and to amend Chapter 135 to clarify the responsibility of owners and operators to undertake further assessment and corrective action in the event the study confirms unacceptable risk to PWSWs. The stakeholders agreed not to object to the noncontroversial parts of the rule making published as **ARC 6892B**.

On October 14, 2008, the ARRC voted to impose a partial "session delay." (See the November 5, 2008, Iowa Administrative Bulletin.) In recognition of the stakeholder agreement, the ARRC imposed a session delay only on those more controversial portions of the adopted rules published as **ARC 6892B** which dealt with the PWSW assessment protocol. The effect of the partial delay was that the prior 70-day delay on the remainder of the rule making expired October 16, 2008. The rules not subject to the session delay became effective October 17, 2008.

At a public meeting held on November 10, 2008, the Commission reviewed and approved the proposed stakeholder agreement, including the 28E Agreement, and this Notice of Intended Action.

These proposed amendments rescind those parts of the rules adopted in **ARC 6892B** which establish the policy and procedure for conducting risk assessment to PWSWs outside the actual or modeled plume. The terms of the 28E Agreement are generally accepted as being sufficient to protect PWSWs during

the study. The terms of the 28E Agreement explicitly acknowledge that, in the event sufficient proof of unreasonable risk to a PWSW is established during the study, the UST Fund would provide funding to take necessary corrective action under two basic circumstances: (1) When the UST site claimant is otherwise “fund eligible,” assessment and corrective action to address risk to the PWSW would be treated as a fund-eligible cost; and (2) When the Department has issued a no further action certificate (NFA certificate) prior to a determination of risk to the PWSW, the UST Fund shall agree to provide funding for corrective action pursuant to the authority granted in Iowa Code section 455G.9(1)“k.” This provision generally specifies that the Department and UST Fund enter into an agreement to provide a funding mechanism to address unreasonable risk which is discovered after issuance of an NFA certificate and which is not the result of a release which occurs after the release for which the NFA certificate has been issued.

Under the 28E Agreement, it is possible that the study could result in establishing sufficient proof of risk to a PWSW which is located outside the actual or modeled groundwater plume. In recognition of this fact, and with the support of the Commission and the participating stakeholders, the proposed amendments add language to clarify the authority of the Commission, under 567—Chapter 135, to require the responsible UST owner and operator to undertake further assessment and corrective action consistent with the risk-based corrective action rules 567—135.8(455B) through 567—135.12(455B) when the Tier 2 groundwater model is shown to be underpredictive.

Any person may make written suggestions or comment on the proposed amendments on or before January 6, 2009. Written comments should be directed to Elaine Douskey, UST Section Supervisor, Iowa Department of Natural Resources, Wallace State Office Building, Des Moines, Iowa 50319. Comments may be sent by E-mail to elaine.douskey@dnr.iowa.gov.

Given the long period of public participation and the extensive stakeholder participation in the issues surrounding these amendments, the Department is conducting one public hearing. The hearing will be held on January 6, 2009, at 1:30 p.m. in the Fourth Floor Conference Rooms, Wallace State Office Building, 502 E. 9th Street, Des Moines, Iowa.

The 28E Agreement between the Department and the UST Fund pertains to the expenditure of funds but not as a direct result of this rule making. The agencies have agreed to undertake a study of risks to PWSWs pursuant to their joint statutory authorities. Therefore, a fiscal impact statement in accordance with Iowa Code section 17A.4(3) and 25B.6 is deemed to be unnecessary.

These amendments are intended to implement Iowa Code section 455B.474.

The following amendments are proposed.

ITEM 1. Rescind the definition of “Sensitive area” in rule **567—135.2(455B)**.

ITEM 2. Adopt the following **new** paragraph **135.8(1)“e”**:

e. Pathway reevaluation. Prior to issuance of a no further action certificate in accordance with 135.12(10) and Iowa Code section 455B.474(1)“h”(3), if it is determined that the conditions for an individual pathway that has been classified as “no action required” no longer exist, or the site presents an unreasonable risk to a public water supply well, or the model used to obtain the pathway clearance underpredicts the actual contaminant plume, the individual pathway shall be further assessed consistent with the risk-based corrective action provisions in rules 567—135.8(455B) through 567—135.12(455B).

ITEM 3. Rescind and reserve paragraph **135.9(4)“f.”**

ITEM 4. Amend paragraphs **135.10(4)“a”** and **“b”** as follows:

a. Pathway completeness. Unless cleared at Tier 1, this pathway is complete and must be evaluated under any of the following conditions: (1) the first encountered groundwater is a protected groundwater source; or (2) there is a drinking water well or a non-drinking water well within the modeled groundwater plume or the actual plume as provided in 135.10(2)“j” and 135.10(2)“k.” ~~A public water supply screening and risk assessment must be conducted in accordance with 135.10(4)“f” for this pathway.~~

b. Receptor evaluation. All drinking and non-drinking water wells located within 100 feet of the largest actual plume (defined to the appropriate target level for the receptor type) must be tested,

at a minimum, for chemicals of concern as part of the receptor evaluation. Actual plumes refer to groundwater plumes for all chemicals of concern. Untreated or raw water must be collected for analysis unless it is determined to be infeasible or impracticable. ~~The certified groundwater professional or the department may request additional sampling of drinking water wells and non-drinking water wells as part of its evaluation.~~

All existing drinking water wells and non-drinking water wells within the modeled plume or the actual plume as provided in paragraph “a” must be evaluated as actual receptors. Potential receptors only exist if the groundwater is a protected groundwater source. Potential receptor points of exposure are those points within the modeled plume or actual plume that exceed the potential point of exposure target level. The point(s) of compliance for actual receptor(s) is the receptor. The point(s) of compliance for potential receptor(s) is the potential receptor point of exposure as provided in 135.10(2)“j” and 135.10(2)“k.”

ITEM 5. Rescind and reserve paragraph **135.10(4)“f.”**

ITEM 6. Rescind and reserve paragraph **135.10(11)“h.”**